No. 30

In the Supreme Court of the United States

OCTOBER TERM, 1957

FLOYD LINN RATHBUN, PETITIONER

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Appeals (R. 15-20) is reported at 236 F. 2d 514.

JURISDICTION

The judgment of the Court of Appeals was rendered on August 23, 1956 (R. 20), and a petition for rehearing was denied on October 1, 1956 (R. 21). The petition for a writ of certiorari was filed on October 31, 1956, and granted on January 14, 1957 (R. 21-22, 352 U.S. 965). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

As limited in the order granting the writ of certiorari (R. 21, 352 U.S. 965), the question is:

Is the listening in of third parties on an extension telephone in an adjoining room, without consent of the sender, an interception of a telephone message, and the divulgence of the contents of such conversation prohibited by statute, to wit Sec. 605, Title 47; U.S.C.A.[1]

There is now pending before this Court on petition for a writ of certiorari to the Second Circuit the question of whether evidence obtained in violation of 47 U.S.C. 605 by state officers enforcing state law, without the participation of federal officers, must be excluded by a federal court. *Benanti* v. *United States*, No. 231, this Term. In the event it should be held here that the evidence was illegally obtained under 47 U.S.C. 605, the conviction of the petitioner should still not be reversed if the ruling of the Second Circuit is followed. Therefore, we include a discussion of this issue at pages 26 to 31, *infra*.

STATUTE INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, 48 Stat. 1064, 1103 (47 U.S.C. 605), provides as follows:

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[1] The phraseology of this question is taken directly from the petition. In using the word "sender" the petitioner makes the assumption that the initiator of a two-way telephone conversation is a "sender" within the meaning of the Communications Act. We shall discuss the validity of this assumption below.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the

benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

STATEMENT

Following a trial by jury, petitioner was convicted in the United States District Court for the District of Colorado under a two-count indictment which charged him with knowingly transmitting in interstate commerce on March 17, 1955, a communication containing a threat of personal injury in aid of an attempted extortion, in violation of 18 U.S.C. 875(b) and (c) (R. 2-4). He was sentenced to concurrent terms of imprisonment of one year and one day on each count and a fine of $1,000 upon count 1 (R. 4-5). On appeal, the judgment of conviction was affirmed (R. 20).

The circumstances under which the communications were made, although not reprinted in the record, are not in dispute (Pet. Br. 5-7). The complaining witness, Mr. Sparks, had been a close business and social acquaintance of petitioner for about 12 to 15 years. Sometime about April, 1954, a stock certificate covering 120,000 shares of stock in Western Oil Fields, Inc., was issued in Mr. Sparks' name and deposited as collateral to cover a $50,000 loan which Mr. Sparks had obtained for petitioner. During the day and morning of March 16-17, 1955, petitioner, who was in New York, had about four tele-

phone conversations with Mr. Sparks in Pueblo, Colorado, in an attempt to have Mr. Sparks release the Western Oil Fields, Inc., certificate of stock so that he could obtain funds. Mr. Sparks refused to comply with petitioner's request unless he first obtained a release from Western, but petitioner did not wish Western to be notified.

The last telephone conversation, which took place about 1:00 a.m., March 17, 1955 (Colorado time), was initiated by petitioner (R. 8). In anticipation of the call Mr. Sparks had called Officers Maybers and Huskins of the local police and told them of the prior threats (R. 10). At his request they listened to the conversation on an extension telephone in an adjoining room when the call came in (R. 10-13). Over petitioner's objection that such evidence was inadmissible as being in violation of Section 605 of the Federal Communications Act, *supra*, pp. 3-4 (R. 9-11). Officer Huskins testified that he heard petitioner threaten to kill Mr. Sparks, because Mr. Sparks would not release the Western stock certificate. He testified that petitioner said: "I am going to kill you, and I don't care if you're making a recording of this conversation" (R. 13). Petitioner, although admitting that he used strong and vulgar language, denied that he made any threats of any kind to Mr. Sparks in this or any other conversation.[2]

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[2] Petitioner returned to Colorado the following day and was arrested in Denver. A gun was found in his possession, but petitioner said that, having been a deputy marshal until thirty days prior thereto, he always carried a gun.

SUMMARY OF ARGUMENT

In this case a witness testified to a telephone conversation which he heard on a regularly installed telephone instrument with the knowledge and consent of one of the parties to the conversation. The major issue is whether this was an "interception" forbidden by 47 U.S.C. 605.

I

47 U.S.C. 605 forbids the interception and divulgence of telephone conversations, *Nardone* v. *United States*, 302 U.S. 379, but it does not prevent the parties to a telephone conversation from disclosing what was said. Telephone conversations are not privileged communications and are protected only while they are passing through the telephone lines, and before they arrive at the "destined place". *Goldman* v. *United States*, 316 U.S. 129, 134; *Nardone* v. *United States*, 308 U.S. 338. The legislative history of Section 605 shows that Congress intended to forbid only the surreptitious interjection into the circuit of an independent device for overhearing or recording the conversation—a practice which had been held not unconstitutional in *Olmstead* v. *United States*, 277 U.S. 438.

The word "intercept" as used in Section 605 has been defined by this Court as indicating the taking or seizure by the way or before arrival at the destined place. *Goldman* v. *United States*, *supra*. As applied there, this Court held that no interception occurred when a listening device was used to listen surreptitiously to the talker's voice itself as he made

a telephone call, rather than to the electric transmission of his voice. When applied to the recipient of a telephone call, it follows that no interception occurs when a third party is permitted to share the handset with the recipient and thus hear both parts of the conversation. The statute does not forbid eavesdropping, it forbids tampering with the communication system. Lower courts have so held.

The same considerations apply when a regularly installed second telephone is used, with the consent of one of the parties, to overhear the conversation. The term "destined place" referred to in *Goldman* must mean the telephone installation corresponding to the number called by the one who initiates the call. All telephone instruments there connected are part of that installation. All correspond to the number called. The message arrives simultaneously at each extension handset. There is no interjection of a tap. All telephone instruments are part of the "destined place" of the telephone communication. The recipient of the call, therefore, is free to authorize another to listen to the conversation on a second telephone, just as he may permit another to share his handset. A large majority of the lower courts regard the two cases as indistinguishable.

In most communications the speaker relinquishes control over what is said, written, or conveyed by telephone. He accepts the chance—except for certain privileged communications—that the recipient may use the message for his own ends, or may be an undercover police agent who will testify, or may carry a hidden transmitter. *On Lee* v. *United*

States, 343 U.S. 747. Both the Fourth Amendment and Section 605 protect the same kind of privacy. The statute merely puts the parties on the same footing as that found in a face-to-face conversation. There is no Fourth Amendment violation when one party in a face-to-face conversation is wired for sound, thus permitting a third party to listen in; there should be no statutory violation when one party to a telephone conversation permits a third party to listen on an extension. Similarly, in the case of a letter, its writer cannot complain if the addressee authorizes a third party to receive, open, and use the contents of the letter. The federal statute which protects the mails terminates with delivery at the destined place.

Extension telephones are in widespread use. It is a common—even necessary—business practice to have a secretary take notes on telephone calls through the use of a second telephone. Persons placing telephone calls are generally aware that their message may be received at one or more instruments corresponding to the number called, and that a record may be made of the contents of the call. To hold that every secretary who assists her employer in this fashion commits a federal offense would go far beyond the situation contemplated by Congress when it enacted Section 605. The overhearing of a conversation on a telephone extension does not interfere with the means by which the message is transmitted from the sender to the receiver; it is not a taking of the message before arrival at the destined place. It is, therefore, not a prohibited interception.

II

Moreover, regardless of whether an unauthorized use of an extension is held to be a violation of Section 605 of the Communications Act, the record here indicates that both parties to the conversation consented to its being overheard. The Act by its terms applies only to unauthorized interceptions. On the record it is clear that Mr. Sparks invited the police officers to listen and that the petitioner independently asserted, "I don't care if you're making a recording of this conversation." (R. 13.) Under these circumstances, petitioner has no basis now to complain about what was done.

III

Whether or not the listening on the extension was an illegal interception, evidence of what was heard was nevertheless admissible, because it was obtained by local officers enforcing local law without federal participation.

Petitioner had threatened Sparks in several telephone calls on March 16, 1955, prior to the call which was overheard. Sparks believed that petitioner was sincere and sought local police protection. The local police who listened were trying to assess the danger of violence—a matter within their competence. Federal officers did not participate in the listening, and there was no collusion between state and federal officers.

Evidence obtained by state officers in violation of the Fourth Amendment is admissible in federal pros-

ecutions when federal officers did not participate in the violative act and where the illegal action by state officers was taken in enforcement of state law. *Lustig* v. *United States*, 338 U.S. 74.

The kind of privacy protected by Section 605 is similar to the privacy protected by the Fourth Amendment. *Nardone* v. *United States*, *supra*, 308 U.S. 338, 340-341. If *Weeks* v. *United States*, 232 U.S. 383, does not require federal courts to exclude evidence unlawfully seized by state officers enforcing state law, *Lustig* v. *United States*, *supra*, then Section 605 and the *Nardone* rule should not be held to bar wiretap evidence obtained by state officers enforcing state law.

ARGUMENT

I

Evidence Obtained By Listening To A Telephone Conversation Through the Use of a Regularly Installed Connection With the Consent of One of the Parties To the Conversation Is Not Obtained In Violation of Section 605 of the Communications Act and May Be Admitted In Evidence.

This case raises the question of whether a violation of Section 605 of the Federal Communications Act occurs when one person testifies to a telephone conversation which he overheard on a regularly installed telephone connection, with the knowledge and consent of one of the parties to the conversation. The government's position is that such listening-in is not an interference with the means of communication and therefore not an inter-

ception prohibited by Section 605. The situation is essentially the same as where one party permits a third person to overhear the conversation as it is received in the handset used by the intended receiver. There is no interception of the message before its receipt at the place to which it is directed, the act forbidden by the statute. There is merely disclosure by the recipient of the message at the time of its receipt—a disclosure to which the statute does not relate, an act which it does not forbid.

A. ***Section 605 does not prevent one party to a telephone conversation from revealing its contents. It precludes interference with the system of communication by interception in the process of transmission.***

Section 605 of the Federal Communications Act of 1934, 47 U.S.C. 605, prohibits the interception and divulgence [3] of telephone communications, *Nardone* v. *United States*, 302 U.S. 379. It does not restrict disclosure by the parties of the substance or terms of the communication.[4] Either party, assuming there are two, may testify to its contents. Either one may set out in a memorandum what was said,

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[3] There was divulgence in this case; the only question is whether there was interception. Therefore, we do not reach the question of whether there must be both interception and divulgence before 47 U.S.C. 605 is violated.

[4] In this brief, we are concerned only with direct communications between two parties, rather than messages sent over a telegraph or radio system where employees of the system do the actual transmitting and receiving. Section 605 does of course prohibit disclosures or improper use of information coming into the possession of employees by reason of their positions.

without the consent of the other. "The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation." *Goldman* v. *United States*, 316 U.S. 129, 133. No question of a privileged communication arises. *United States* v. *Pierce*, 124 F. Supp. 264, 269 (N.D. Ohio), affirmed, 224 F. 2d 281 (C.A. 6). As construed by this Court, Section 605 achieves its protective purpose by forbidding the interception of a telephone conversation while it is within a "realm of privacy" during its passage through the telephone lines. *Nardone* v. *United States*, 308 U.S. 338, 340; *Goldman* v. *United States*, *supra* 316 U.S. 129, 133-134. In this respect, the section merely puts the parties on the same footing as though they had spoken face-to-face. What they choose to do thereafter with the knowledge so gained is not the concern of the statute. The substance and terms of the communication are not privileged simply because the telephone system was used.

The legislative history shows that Congress intended to safeguard the privacy of means of communication by forbidding the surreptitious interjection of an independent device for the purpose of interception by a listener or a recorder, not to protect the message from disclosure by the receiver.

The first legislative effort to safeguard private radio communications was contained in the Radio Act of 1912 (37 Stat. 302) which established federal control over interstate radio. The nineteenth section of that act was captioned "Secrecy of Messages"

and forbade, not interception, but "divulging or publishing" radio messages without authorization.[5]

The nineteenth section of the 1912 Act was replaced by Section 27 of the Radio Act of 1927 (c. 169, 44 Stat. 1164, 1172). Although the act dealt only with radio, a portion of Section 27 bore a clear relation to that part of Section 605 which is material here, for it said:

> * * * and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person * * *.

In 1928, this Court decided *Olmstead* v. *United States*, 277 U.S. 438, holding that the rule of exclusion, as to evidence obtained in violation of the Fourth Amendment, did not apply to evidence obtained through the tapping of telephone wires, even though the law of the state involved prohibited such

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[5] The text of the section read as follows:

"No person or persons engaged in or having knowledge of the operation of any station or stations, shall divulge or publish the contents of any messages transmitted or received by such station, except to the person or persons to whom the same may be directed, or their authorized agent, or to another station employed to forward such message to its destination, unless legally required so to do by the court of competent jurisdiction or other competent authority. Any person guilty of divulging or publishing any message, except as herein provided, shall, on conviction thereof, be punishable by a fine of not more than two hundred and fifty dollars or imprisonment for a period of not exceeding three months, or both fine and imprisonment, in the discretion of the court."

practice. Thereafter, numerous bills were introduced to overcome the effect of the *Olmstead* decision,[6] but all of these efforts, save one,[7] failed until the passage of the Communications Act of 1934, 48 Stat. 1064, as amended, replacing the Radio Act of 1927, *supra*.

Section 605 of the Communications Act of 1934 (47 U.S.C. 605) prohibits the unauthorized interception and publication or use of communications, saying, in part:

> * * * and no person not being authorized by the sender shall intercept any communication and divulge * * * [its contents] to any person; * * *.

The only explanation of this section was contained in House Report 1850, 73rd Congress, 2d Session (p. 9), where it was said:

> Section 605, prohibiting unauthorized publication of communications, is based upon section 27 of the Radio Act, but is also made to apply to wire communications.

While this explanation is rather crytic, it was plain enough that Congress intended, by the use of the word "intercept", to forbid the procedure held not to be forbidden by the Fourth Amendment in *Olm-*

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[6] H.R. 4139, H.R. 5416, 71st Cong., 1st Sess.; S. 6061, 71st Cong., 3d Sess.; see 71 Cong. Rec. 5968; H.R. 23, H.R. 5305, H.R. 9893, S. 1396, 72d Cong., 1st Sess.; see 75 Cong. Rec. 4541, 4733; 74 Cong. Rec. 3928.

[7] A provision of the Department of Justice Appropriation Act for the year ending June 30, 1934 (approved March 1, 1933) forbade the use of any part of the appropriation for "wire tapping" to procure evidence of violations of the National Prohibition Act, 47 Stat. 1379, 1381.

stead, supra—the interjection of an independent device in the telephone system used by the parties to a telephone conversation. *Nardone* v. *United States*, *supra*, 302 U.S. 379, 382; *Nardone* v. *United States*, *supra*, 308 U.S. 338; *Weiss* v. *United States*, 308 U.S. 321, 326.

The issue in this case, therefore, is whether listening on an extension telephone is an interception imposed upon the communication system or merely the overhearing of a message sent through a system which has not been tampered with.

B. *Listening on a regularly installed telephone instrument to a message which has been transmitted without interruption to the place to which it was directed is not an interception within the meaning of Section 605.*

In *Goldman* v. *United States*, 316 U.S. 129, 134, this Court defined the word "intercept" for the purposes of Section 605, saying:

> * * * this word indicates the taking or seizure by the way or before arrival at the destined place. It does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver.

As applied in that case, the definition meant there was no interception when a detectophone was used to listen surreptitiously to the defendant's conversation as he made a telephone call.

When *Goldman* is applied to the reception of a telephone call, it follows that no interception results if a third party is permitted to overhear the con-

versation at the handset used by the recipient. Under *Goldman*, no forbidden interception occurs when someone overhears the voice of the original *sender* as he speaks for there has been no taking of the communication while it was within the protected conduit. Equally, there is no interception if someone overhears the *reception* of the call. And if someone overhears both through the handset of the recipient, Section 605 is not violated. In such a case there has been no taking before arrival. The transmission has ended; the message has fully passed through the means of communication. *Rayson* v. *United States*, 238 F. 2d 160 (C.A. 9); *United States* v. *Bookie*, 229 F. 2d 130 (C.A. 7); *United States* v. *Lewis*, 87 F. Supp. 970 (D.D.C.), reversed on other grounds, 184 F. 2d 394 (C.A.D.C.); *United States* v. *Pierce*, 124 F. Supp. 264 (N.D. Ohio), affirmed *per curiam*, *Pierce* v. *United States*, 224 F. 2d 281 (C.A. 6). The statute does not forbid eavesdropping; it forbids tampering with the line of communication. No privilege attaches to the substance of the message; the privilege relates only to the means by which the message gets from the place from which it was sent to the place to which it was sent. Beyond that means, at either end, either party would be free to use an amplifier or acoustic-type recording device,* authorize a third person to do

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* Orders of the Federal Communications Commission dated November 26, 1947, and May 20, 1948, applying to interstate and foreign calls, require telephone common carriers to post tariff schedules for the permanent attachment of mechanical recorders and transcribers to subscriber telephones. The

so, or permit another to listen with him at his handset.

The considerations discussed above also apply when an extension telephone[9] is used, with the consent of one of the parties, to overhear the conversation. In *Goldman* v. *United States*, *supra*, 316 U.S. at p. 134,

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attachment is usually made at the bell box of the telephone instrument and may be made only by the telephone company. A condition of such an installation is that an automatic tone warning device be used in connection with it. If the subscriber makes his own permanent connection and does not use the warning device he commits a breach of his contract with the telephone company and may be subject to the sanctions of 47 U.S.C. 401 and 411. However, there are three general types of recording devices which may be used with a telephone circuit. The first relies upon a direct physical connection to the telephone circuit. This system is subject to detailed regulation, as mentioned above. The second is the inductive type which relies upon the use of an induction coil placed in proximity to the telephone line. The Commission regards its use as prohibited by the Commission's orders. The third is the acoustic type which amplifies and records the telephone message as it is reproduced at the handset. The Commission expressly has not attempted to regulate the use of this type. See Report of the Commission In the Matter of Use of Recording Devices in Connection with Telephone Service, Adopted March 24, 1947, Docket No. 6787, 11 F.C.C. 1033, and orders dated November 26, 1947, and May 20, 1948, issued in connection therewith, 12 F.C.C. 1005, 1008.

[9] The use of the term "extension" may be misleading. In general use, all telephone instruments installed in a home are on a parity; no one is the principal receiver and the others subsidiary. In this case, it appears to have been a matter of chance, or convenience, which instrument Mr. Sparks used. Thus, the use of the word "extension" really means another regularly installed telephone instrument.

the word "intercept" was held to mean "* * * the taking or seizure by the way or before arrival at the destined place" (*supra*, p. 15). The term "destined place" must be understood to mean the telephone station called, including all of the instruments regularly installed there. When a person calls a certain telephone number, he is entitled to have his message travel unimpeded to the handsets corresponding to that number. But every attached instrument is equally a part of the installation for that number and multiple attachments are in common use. The person who answers may use any one of several instruments, and if physical proximity permits, he may use two or more. All correspond to the number called. All are part of the particular installation. The message arrives at all of the instruments simultaneously. All are part of the "destined place". Far from presenting the usual case of surreptitious wire tapping, there is no interjection of an independent device, no tampering with the line. The recipient of the call, therefore, is free to authorize another to listen to the conversation on another instrument, just as he may permit another to share his handset.

In any communication to another—whether by speech, written word, or electronic means—a person relinquishes control over what is expressed. In the case of a face-to-face conversation, he accepts the chance that the person addressed will use the thought or fact expressed for his own ends. The hearer may repeat it to his friends and thus render the communication public knowledge; he may be an undercover police agent who will later testify; he may have

secreted another person nearby to overhear what is said; he may carry a secret transmitter and thereby permit others to overhear the conversation. *On Lee* v. *United States*, 343 U.S. 747. Except for certain privileged relationships, there is no legal basis for complaint in these instances. There is no violation of the Fourth Amendment.

The protection accorded telephone conversations arises from statute and not from the Fourth Amendment, but the kind of privacy protected by the former is similar, by analogy, to that preserved by the latter. *Nardone* v. *United States*, *supra*, 308 U.S. at 340-341; *Goldstein* v. *United States*, 316 U. S. 114, 120-121; *Schwartz* v. *Texas*, 344 U.S. 199, 201. It is therefore reasonable to interpret Section 605 as providing a privacy corresponding to that involved in a face-to-face exchange. On this basis, there is no violation of the statute if the recipient of the telephone call tells another its substance, or attaches an amplifier or recorder to his handset, or permits another to listen at his handset, or on another instrument. If there is no violation of the Fourth Amendment when it turns out that one of the parties to a face-to-face conversation carried a hidden transmitter, *On Lee* v. *United States*, *supra*, there should be no violation of Section 605 when one party to a telephone communication permits another to listen on another instrument. True enough, there is something undisclosed to the communicant in both instances. The first sort of non-disclosure is permissible under the Constitution; the second is permissible under the statute.

An analogy may be drawn to the ban on interception of letters, which derives from the Fourth Amendment, *Ex parte Jackson*, 96 U.S. 727, and is implemented by statutes prohibiting obstruction of the mails. 18 U.S.C. 1702, 1708. The protection extends only while the letter is in the mails, and not before deposit or after delivery to the person to whom it is addressed. The addressee may testify to the letter's contents, or permit another to read it, or copy it, or authorize another to accept delivery of and open the letter. *Maxwell* v. *United States*, 235 F. 2d 930, 932 (C.A. 8), certiorari denied, 352 U.S. 943. The reach of the federal law terminates with that delivery. The author of the letter has no cause for complaint regarding the identity of the agent appointed to accept and open the letter. Similarly, the coverage of Section 605 terminates when the telephone message is delivered into the handset or handsets corresponding to the number called. There is no violation if the person called authorizes another to receive the message on a second instrument.

A ruling that the use of a telephone extension is not an interference with the system of telephone communication seems particularly appropriate in the light of the widespread use of extension telephones. Prudent business practice requires some sort of record of oral communications. The practical method of preserving the substance of transactions conducted over the telephone is by contemporaneous notes or recording. For this reason, many individuals, in business, government, and the professions, have their secretaries listen to telephone calls on a second in-

strument in order to record the message in shorthand. The practice is sufficiently widespread so that an individual placing a telephone call is generally aware that his message may be received by more than one handset and that a record may be made of it. To hold that every secretary who takes notes in this fashion violates a federal statute would stretch the statute far beyond the evil intended to be prohibited by Congress.

Most of the lower courts have regarded as indistinguishable the factual situation where the conversation is overheard at the same handset used by a party and the situation where a conversation is overheard on a second telephone. *United States* v. *White*, 228 F. 2d 832 (C.A. 7); *Flanders* v. *United States*, 222 F. 2d 163 (C.A. 6); *United States* v. *Guller*, 101 F. Supp. 176 (E.D. Pa.); *United States* v. *Sullivan*, 116 F. Supp. 480 (D. D.C.); *United States* v. *Lewis*, *supra*, 87 F. Supp. 970 (D. D.C.), reversed on other grounds, 184 F. 2d 394 (C.A. D.C.); *United States* v. *Pierce*, *supra*, 124 F. Supp. 264 (N.D. Ohio), affirmed, 224 F. 2d 281 (C.A. 6); *United States* v. *Yee Ping Jong*, 26 F. Supp. 69 (W.D. Pa.); *contra*, *United States* v. *Polakoff*, 112 F. 2d 888 (C.A. 2); *Reitmeister* v. *Reitmeister*, 162 F. 2d 691 (C.A. 2); *James* v. *United States*, 191 F. 2d 472 (C.A. D.C.). Some indeed have involved both situations. *United States* v. *Lewis*, *supra*, 87 F. Supp. 970 (D. D.C.), reversed on other grounds, 184 F. 2d 394 (C.A. D.C.); *United States* v. *Pierce*, *supra*, 124 F. Supp. 264 (N.D. Ohio), affirmed, *Pierce* v. *United States*, 224 F. 2d 281 (C.A. 6). The majority view

has been that the definition of interception approved in *Goldman* v. *United States*, 316 U.S. at p. 134, leads to the conclusion that Section 605 does not prohibit the use of an extension telephone to overhear a conversation, and that lower court decisions to the contrary which were published prior to *Goldman* were discredited by it. See *Flanders* v. *United States*, *supra*, 222 F. 2d 163, 167 (C.A. 6), which considered all the authorities and then took the course urged by the government here, saying, "* * * [we] consider that the route we follow was pointed out by the Supreme Court in *Goldman v. United States*, *supra*"; *United States* v. *White*, *supra*, 228 F. 2d 832, 835 (C.A. 7), following *Flanders;* the decision below, 236 F. 2d 514, 518 (C.A. 10), saying "* * * we think the *Goldman* case controls * * * [and] that Rathbun's conversation was not intercepted * * * before it reached the ears of Sparks"; *United States* v. *Pierce*, *supra*, 124 F. Supp. 264, 269 (N.D. Ohio), saying, "In this case there was no interference with the means of communication. The conversations were heard by the officers 'at the moment' they came 'into the possession of the intended receiver'"; *United States* v. *Sullivan*, *supra*, 116 F. Supp. 480 (D. D.C.); *United States v. Guller*, *supra*, 101 F. Supp. 176 (E.D. Pa.)

The Second Circuit is the only one which has squarely held that a person who overhears another's conversation over an extension "intercepts" the communication within the meaning of Section 605.[10] In

[10] In *James* v. *United States*, 191 F. 2d 472, the Court of Appeals for the District of Columbia said, with reference to

United States v. *Polakoff*, *supra*, 112 F. 2d 888, 889 (C.A. 2), decided before *Goldman*, that circuit held "The statute does not speak of physical interruptions of the circuit, or of 'taps'; it speaks of 'interceptions' and anyone intercepts a message to whose intervention as a listener the communicants do not consent; * * *." This definition of "interception" is so broad as to render inadmissible the testimony permitted in *Goldman*, where the communicant did not consent to the "intervention as a listener" of the police officer. The Second Circuit modified its definition in *Reitmeister* v. *Reitmeister*, 162 F. 2d 691 (C.A. 2), where, in the course of its opinion in a civil suit, the court did reaffirm its position that listening on an extension with the consent of only one party was within the scope of Section 605, but on the ground that the use of an extension was the interjection of an independent listening device into the circuit."[11]

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a wire recording in which the identity of the speaker was disputed, that the recording was inadmissible because one of the parties "did not consent to the interception of the conversation and the use of the recording as evidence." The decision cited *United States* v. *Polakoff*, 112 F. 2d 888 (C.A. 2), *supra*. It has not been uniformly followed within the District of Columbia Circuit. Cf. *United States* v. *Sullivan*, 116 F. Supp. 480, 483-484, and *United States* v. *Stephenson*, 121 F. Supp. 274.

[11] In *United States* v. *Hill*, 149 F. Supp. 83 (S.D. N.Y.), the court held that, where a third party shared the handset of one of the parties to the communication, there was a forbidden interception. The district judge no doubt felt bound by *Reitmeister* v. *Reitmeister*, *supra*. However, there is a fallacy in the judge's reasoning which is vital to the holding. He concludes that (p. 85), " * * * the basic purpose of § 605

Judge Chase disagreed on this point, saying (pp. 697-698):

> * * * I do not believe that our decision in United States v. Polakoff, 2 Cir., 112 F. 2d 888 has survived that of the Supreme Court in Goldman v. United States, 316 U.S. 129, * * *.
>
> * * * *
>
> The "overhearing" by the recording instrument in the appellee's office was no more the interception of a wire communication than the overhearing of the messages by a person at that place would have been. Because these messages ceased to be wire communications within the meaning of the statute as soon as they became audible at the receiving station called, the Communications Act did not thereafter apply to make their preservation an unlawful interception or their use an unlawful disclosure.

This statement by Judge Chase, which is in accord with the holding of the great majority of the courts which have ruled upon the issue, is a succinct statement of the government's position on this issue. The overhearing of a conversation on a telephone extension does not interfere with the means by which the message is transmitted from the sender to the receiver. It is therefore not an interception prohibited by Section 605.

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to protect the privacy of telephone conversations and their means of transmission * * *" cannot be achieved if the shared handset situation is not prohibited. This is contrary to the *Goldman* ruling, which does not say that Section 605 protects the privacy of telephone communications, but that the section protects that privacy while the message is within the transmission conduit.

II

Regardless of Whether An Unauthorized Use of An Extension Telephone Is Deemed a Violation of Section 605 of the Communications Act, the Record Here Shows That Both Parties Consented.

Section 605 of the Communications Act does not prohibit the interception and divulgence of communications when "authorized by the sender." See *supra*, p. 3. As Judge Learned Hand pointed out in *United States* v. *Polakoff*, 112 F. 2d 888, 889 (C.A. 2), the term "sender" is not apt for the antiphonal exchange of conversation over a telephone system. It is suggested that the statute must be read as requiring consent by both parties to the conversation, each being in turn a "sender".[12] Even on this construction of the law, the evidence shows that both parties consented.

As to Mr. Sparks' end of the conversation in Colorado, there can be no dispute that the police officers were authorized by him to listen. He called them to his house and installed them in his dining room for that very purpose (R. 10-13). As to the petitioner, it cannot be asserted that he knew or approved of the action by the specific officers. However, the record shows his awareness that the conversation might be being recorded and his consent that it continue, for he stated "I am going to kill you, and I don't

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[12] In this case, the call originated with the petitioner in New York, so that if one or the other must be selected as the "sender" it is logical that it should be the petitioner. Presumably it is on this basis that the petitioner assumes in his statement of the question presented that the petitioner was the "sender".

care if you're making a recording of this conversation." (R. 13.) Certainly this appears to be a general ratification of Sparks' action in having the conversation witnessed. Thus, passing over technical questions as to who was the "sender", there was in this case authorization by both parties to the conversation.

III

The Evidence Is Admissible In Any Event Because It Was Obtained By State Officers Enforcing State Law Without Participation By Federal Officers[13]

A. *The local police were acting in a local matter.*

Apart from the question of whether the evidence as to the overheard threats could be deemed an interception without consent, it was nevertheless properly admitted in this case because it was obtained by state officers enforcing state law without participation by federal officers.

Sparks had called local police to seek their help in the face of petitioner's threats. The tone of all of the telephone calls on March 16 was threatening and profane. Sparks manifestly thought petitioner was serious and he sought protection against vio-

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[13] This issue is not included in the grant of certiorari as limited. However, the issue has since come before the Court in the *Benanti* case, No. 231 (see *supra*, p. 2), and, if we are correct in our argument in this Point III, the judgment below should be affirmed even if we are wrong on the question as to which certiorari was granted. Normally, the respondent can support the judgment below on any proper ground even if it was not the basis of the ruling of the lower court and even if it was not argued by the respondent below. *Langnes* v. *Green*, 282 U.S. 531, 535-539; *Walling* v. *General Industries Co.*, 330 U.S. 545, 547.

lence, a local crime. The local police, in listening in, were trying to assess the danger of violence—a matter within their competence. This had to do with the enforcement of local law, not federal law. No federal officer participated in the surveillance or even had knowledge thereof at the time.

Subsequently, petitioner was arrested by federal agents on a federal warrant some twenty-four hours after the threat was uttered. That fact does not make the action of the local officers in listening to the conversations federal action.

Circuit court cases reveal that there must be a showing of collusion or actual participation between federal and local authorities before it may be said that federal agents had a hand in the search. Here, there is not only no showing of such participation, but no showing of knowledge by federal officers. *United States* v. *White*, 228 F. 2d 832 (C.A. 7); *Jaroshuk* v. *United States*, 201 F. 2d 52 (C.A. 9); see also *Shurman* v. *United States*, 219 F. 2d 282 (C.A. 5), certiorari denied, 349 U.S. 921; and *Sloane* v. *United States*, 47 F. 2d 889 (C.A. 10), where it was held that even where federal officers first informed state officials of their suspicions of crime, the action taken by state officers on the information could not be said to involve federal participation. There are cases which hold that, where state officers act solely to enforce federal law, their action must conform to Fourth Amendment standards for evidence obtained thereby to be admissible in federal courts. *Gambino* v. *United States*, 275 U.S. 310; *United States* v. *Butler*, 156 F. 2d 897 (C.A. 10). Those cases are

not applicable here since the police officials were intent upon upholding local, not federal, law. The evidence here was, in the terms of *Lustig* v. *United States*, 338 U.S. 74, 79, "turned over to the federal authorities on a silver platter".

B. *Evidence obtained by state officers enforcing state law without federal participation is admissible in a federal court even if illegally obtained.*

The question of whether evidence obtained by state officials enforcing state law in violation of Section 605 of the Federal Communications Act is admissible in federal courts is presently before this Court on a petition for a writ of certiorari in *Benanti* v. *United States*, No. 231, to review the judgment of the Court of Appeals for the Second Circuit, 244 F. 2d 389, upholding the admissibility of such evidence. As there recognized, the principles which have been established by this Court with relation to evidence obtained through an illegal search by state officers support the admissibility in federal courts of evidence obtained through wire tapping by state officers, so long as there was no federal participation in the interception.[14]

In *Weeks* v. *United States*, 232 U.S. 383, 398, the Court held that it was not error to permit the use

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[14] The Second Circuit in its opinion in the *Benanti* case stated that the evidence was obtained in violation of Section 605 even though the local officers had obtained a warrant under state law authorizing wire tapping. The government has suggested that this may be an undue extension of Section 605 and that the statute need not be interpreted as prohibiting a state from legislating on the subject.

in a federal trial of papers and property improperly seized by state policemen for "it does not appear that they acted under any claim of Federal authority * * *." And in *Byars* v. *United States*, 273 U.S. 28, 33, Justice Sutherland, for a unanimous Court, said:

> We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account.

This Court recognized in *Wolf* v. *Colorado*, 338 U.S. 25, that the federal Constitution, by virtue of the Fourteenth Amendment, prohibits an unreasonable search or seizure by state officers; at the same time, the Court held that the state courts were not required to enforce the right of privacy by excluding evidence unlawfully obtained. But this difference between the rule in the federal courts and that binding on the states is not based on the theory that the Fourth Amendment is more important than the Fourteenth, or that state officers may violate the law where federal officers may not. The purpose of the federal rule is to discourage unlawful conduct, and the only persons as to whom such a rule in the federal courts is effective are federal officers. If an unlawful search or seizure was not participated in by federal agents, a rule of exclusion in the federal courts would not tend to preserve the right of privacy recognized by the Fourth Amendment. State officers enforcing state law who conduct an illegal search and seizure would not be deterred from future violations by an exclusionary rule in the federal courts. Such a ruling would impede federal prosecu-

tion without furthering the judicial policy of discouraging future arbitrary intrusions on individual privacy.

It is for this reason that the exclusionary rule applies only where there has been participation in the illegal or unconstitutional conduct by federal officers. *Lustig* v. *United States*, 338 U.S. 74; *Irvine* v. *California*, 347 U.S. 128, 136; *Feldman* v. *United States*, 322 U.S. 487, 492; *Burdeau* v. *McDowell*, 256 U.S. 465. As stated in Justice Frankfurter's opinion in *Lustig* v. *United States*, *supra*, 338 U.S. 74, 78-79, a search "is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter."

The rationale which limits the federal exclusionary rule, as to searches and seizures, to federal officers applies to wiretapping as well. While the protection accorded telephone conversations arises from Section 605, and not from the Fourth Amendment, we have already pointed out that the kind of privacy protected by the former is similar to that preserved by the latter. *Nardone* v. *United States*, *supra*, 308 U.S. 338, 340-341; *Goldstein* v. *United States*, *supra*, 316 U.S. 114, 120-121. Just as the states need not, under the Fourth and Fourteenth Amendments, adopt the exclusionary rule as to evidence illegally seized, so, under Section 605, the states need not exclude evidence obtained by wiretapping. *Schwartz* v. *Texas*, 344 U.S. 199.[15] Similarly, just as the

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[15] It is at least doubtful that the action by the police officers was illegal under Colorado law. Chapter 40, Article

Fourth Amendment and the *Weeks* rule do not require that federal courts exclude evidence unlawfully seized by state officers enforcing state law, Section 605 and the *Nardone* rule do not require that federal courts exclude evidence obtained by wiretapping by state officers enforcing state law. Since the evidence may be used in state proceedings, state officers will not be deterred from engaging in wiretapping by an exclusionary rule as to federal prosecutions when their purpose is solely to enforce local laws. Hence wiretap evidence obtained by state officers without federal participation should be admitted in federal courts since the object of exclusion as to federal officers does not apply.

4, § 17 of the Colorado Revised Statutes (1953) provides: "Any person who * * * cuts, breaks, taps or makes any connection with any telegraph or telephone line, wire, cable or instrument belonging to another, and wilfully reads, takes or copies any message, communication or report intended for another passing over any such telegraph or telephone line, wire or cable * * * shall be deemed guilty of a misdemeanor * * *." This requires a physical tampering with the line which was not here present. Nor does it appear that, even if the action of the officers had been illegal under state law, their evidence would have been excluded in a proceeding in a state court. *Wolf* v. *Colorado*, 338 U.S. 25.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be affirmed.

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